

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DAVID CARL,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA,

Defendant.

Case No.: 2:19-cv-00504-GZS

STATEMENTS OF MATERIAL FACT

Statements of Material Fact

I. Plaintiff applied for, and received, a First Bankcard credit card from Defendant.

1) Plaintiff, David Carl (“Plaintiff”) obtained a credit card from Defendant, First National Bank of Omaha (“Defendant”), in July 2017. *See* FNBO Account Information, PageID #: 1177 [Ex. Q]. *See also* Carl Dep, p. 11:8-22 [Ex. E].

2) In conjunction with the application for credit, Plaintiff supplied his cellular telephone number, (207) XXX-5865, to Defendant. *See* Deposition of Plaintiff, David Carl (“Carl Dep.”), p. 13:6-25 [Ex. E].

3) Defendant claims to have obtained Plaintiff’s consent to call his cellular telephone using an ATDS or an artificial or prerecorded voice at the time Plaintiff submitted his application for credit. *See* First National Bank of Omaha’s Answers to Plaintiff’s First Set of Interrogatories, No. 12, PageID #: 151 [Ex. A].

II. Defendant began calling Plaintiff’s cell phone frequently in February 2019 to collect payments for the First Bankcard credit card.

4) Sometime after receiving the First Bankcard credit card, Plaintiff fell into financial difficulties. *See* Carl Dep., p. 14:15-25, p. 15: 1-3 [Ex. E].

5) Plaintiff ultimately became past due on his First Bankcard account during February 2019. *See* Carl Dep., p. 40:16-18 [Ex. E]. *See also* FNBO Account Activity Log, Page ID #: 1042 and 1056 [Ex. L].

6) During February 2019, Defendant began calling Plaintiff at telephone number (207) XXX-5865, calling approximately one to six times a day, in order to collect on amounts past due. *See* Carl Dep. p. 18:6-11, p. 24:18-19 [Ex. E]. *See also* FNBO Account Activity Log, PageID #: 1042 and 1056 [Ex. L].

7) Defendant called Plaintiff from the following telephone numbers: (800) 537-3302, (888) 893-9519, (800) 424-6920, and (888) 810-5673. *See* FNBO Outgoing Call log, PageID #: 1070-1139 [Ex. M].

8) Telephone number (207) XXX-5865 was assigned to a cellular telephone service for Plaintiff provided by Verizon Wireless during this time period. *See* Carl Dep., p. 42:4-7 [Ex. E].

III. Plaintiff requested Defendant stop calling his cellular telephone on March 13, 2019, which Defendant's policy is to honor as revocation of prior consent.

9) On March 13, 2019, Plaintiff called Defendant at telephone number (877) 395-3606. *See* Carl Dep. p. 21:6-20, p. 23:1-5 [Ex. E].

10) Telephone number (877) 395-3606 goes to Credit Control. *See* Osborne Dep., p. 51:20-21 [Ex. F].

11) Defendant utilized a vendor called Credit Control during the relevant time period. *See* Osborne Dep., p. 19:19-24 [Ex. F]. *See also* Consent to Assignment, PageID #: 1038-1039 [Ex. K].

12) Telephone number (877) 395-3606 is exclusively used for contacting customers of First Bankcard, a division of First National Bank of Omaha, for account servicing purposes. *See*

Credit Control, LLC's Responses and Objections to Plaintiff's Interrogatories, No. 5 and 15, Page ID #: 165-66, 168 [Ex. D]; Osborne Dep., p. 51:20-25, p. 52:1-7 [Ex. F].

13) The purpose of Plaintiff's call was to get Defendant to stop calling him. *See* Carl Dep. p. 24:7-10 [Ex. E].

14) Defendant's policy requires it to consider an oral request to cease calls as a revocation of prior consent to be called. *See* Deposition of Defendant's Rule 30(b)(6) Witness, Paul Osborne ("Osborne Dep."), p. 42:18-43:1 [Ex. F].

15) The March 13, 2019 conversation between Plaintiff and Defendant proceeded as follows:

Defendant: First Bankcard, Keandra Thompson speaking.

Plaintiff: Yes, hi, I'm returning a call.

Defendant: Uhm, ok. Uhm, can you just hold on for just a second. I'm sorry...
Excuse me sir, can you, uh, give me the phone number that we called you from?

Plaintiff: Yup, 207-837-5865.

Defendant: You said, 207-837-5865?

Plaintiff: Yes ma'am.

Defendant: I'm trying to pull up your account and it won't allow me to. Would you, uhm, state me your full social number and I'll be able to pull up your account?

Plaintiff: What's that?

Defendant: I said, would you be able to give me your full social so I can pull up your account because I typed in your, uhm, phone number and it didn't pop up.

Plaintiff: Ok, [Plaintiff's social security number].

Defendant: You said [Plaintiff's social security number]?

Plaintiff: Yes ma'am.

Defendant: That's not popping up either. (Speaking to someone else) Yeah, I pushed enter.

Plaintiff: I keep getting phone calls from you guys and I really wish you would stop calling.

Defendant: Uhm, do you know what number that we're calling?

Plaintiff: Yeah, you are calling my 207-837-5865. It's the only phone number I have.

Defendant: Ok sir, so I am trying to pop up your account, but it won't allow me to. I typed in your phone number and your social. What is your first and last name sir?

Plaintiff: My first name is David. My last name is Carl, C-A-R-L.

Defendant: David Carl, C-A-R-L?

Plaintiff: Yes.

Defendant: Ok, I'm typing it in. Can you hold on for just a second sir? I have a lot of David Carl's in my account. (Speaking to someone else) Yeah, he said we keep calling his number though; he says he keeps getting a lot of calls from us. Yeah.

Defendant: Excuse me, sir?

Plaintiff: Yes?

Defendant: Do you know the exact phone number that we calling? So we can remove your number from our –

Plaintiff: That's the only phone –

Defendant: Because, I typed in your social, your phone number, and, uhm, your name and I don't see nothing on my account for you sir.

Plaintiff: Well, somebody has been calling me from you, from you guys and using that phone number and I really wish you would stop.

Defendant: Ok, but can you just give me your phone number one more time sir and I will put it in our system to, uh, stop calling?

Plaintiff: Ok, 2-0-7. 8-

Defendant: 2-0-7.

Plaintiff: 3-7.

Defendant: 8-3-7.

Plaintiff: 5-8-6-5.

Defendant: Ok sir, so I'm going to put you in our system, so you can be on the do not call list and I'm sorry for your, uh, troubles sir.

Plaintiff: Alright, thank you.

Defendant: Thank you.

See Transcript of March 13, 2019 Telephone Call, PageID #: 1482-1483 [Ex. Z].

16) Plaintiff's call was answered "First Bankcard, Keandra Thompson speaking." *See* Transcript of March 13, 2019 Telephone Call, PageID #: 1482 [Ex. Z].

17) Plaintiff provided Ms. Thompson with his name, social security number, and cellular telephone number. *See* Transcript of March 13, 2019 Telephone Call, PageID #: 1482 [Ex. Z]. *See also* Carl Dep. p. 25:1-4 [Ex. E].

18) Ms. Thompson claimed she was unable to locate Plaintiff's account. *See* Transcript of March 13, 2019 Telephone Call, PageID #: 1482-1483 [Ex. Z]. *See also* Carl Dep. p. 25:1-4 [Ex. E].

19) Defendant admits that Ms. Thompson could have called Defendant regarding Plaintiff's phone number and social security number. *See* Osborne Dep. p. 78:4-7 [Ex. E].

20) Ms. Thompson informed Plaintiff that she would place his cell phone number on a do not call list. *See* Transcript of March 13, 2019 Telephone Call, PageID #: 1482 [Ex. Z]. *See also* Osborne Dep., p. 50:11-17 [Ex. F].

21) However, Ms. Thompson never notified Defendant about Plaintiff's phone call on March 13, 2019 or that Plaintiff wanted the calls to stop. *See* Osborne Dep., p. 55:2-7 [Ex. F].

22) At no point during the conversation on March 13, 2019 was there any indication to Plaintiff that he failed to call Defendant. *See* Transcript of March 13, 2019 Telephone Call, PageID #: 1482-1483 [Ex. Z]. *See also* Osborne Dep., p. 56:25-57:4 [Ex. F].

23) At no point during the conversation on March 13, 2019 was Plaintiff informed, or given any indication, that he was speaking to any party other than Defendant. *See* Transcript of March 13, 2019 Telephone Call, PageID #: 1482-1483 [Ex. Z]. *See also* Osborne Dep., p. 56:25, p. 57:1-4 [Ex. F].

24) At no point during the conversation on March 13, 2019 did Ms. Thompson, or anyone else on behalf of Defendant, inform, or suggest, that Plaintiff needed to take any additional steps to get the phone calls to stop. *See* Transcript of March 13, 2019 Telephone Call, PageID #: 1482-1483 [Ex. Z].

IV. Defendant called Plaintiff's cellular telephone 708 times after March 13, 2019.

25) After Plaintiff's request on March 13, 2019 for Defendant to stop calling his cell phone, and after Defendant informed Plaintiff it would place his cell phone number on the do not call list, Defendant continued to call Plaintiff at telephone number (207) XXX-5865. First National Bank of Omaha's Responses to Plaintiff's First Set of Requests for Admissions, No. 4, PageID #: 157 [Ex. B].

26) Defendant called Plaintiff's cellular telephone seven hundred and eight (708) times between March 13, 2019 and August 30, 2019. *See* FNBO Account Activity Log, PageID #: 1042-1068 [Ex. L]. *See also* FNBO Outgoing Call log, PageID #: 1070-1139 [Ex. M].

27) These calls were placed in connection with Plaintiff's FNBO credit card. *See* Carl Dep., p. 18:6-10 [Ex. E].

28) Defendant uses a LiveVox Voice Portal Dialing System (“Voice Portal”) to place calls. *See* Osborne Dep., p. 23:3-4 [Ex. F].

29) Each call placed to Plaintiff was made via the Voice Portal dialer. *See* First National Bank of Omaha’s Answers to Plaintiff’s First Set of Interrogatories, No. 17, PageID #: 152 [Ex. A]. *See also* Osborne Dep., p. 32:20-25, p. 33:1-12 [Ex. F].

30) “There were no manual calls made on [Plaintiff’s] account.” *See* Osborne Dep., p. 32:17-18 [Ex. F].

V. The Voice Portal dialing system, as used by Defendant, is a predictive dialer that automatically dials telephone numbers.

31) The Voice Portal dialer, as it was used to call Plaintiff, is a predictive dialer. *See* Osborne Dep., p. 32:13-25, p. 33:1-12 [Ex. F]. *See also* LiveVox Manager User Guide, PageID #: 534 [Ex. I]; Supplemental Declaration of Randall A. Snyder, ¶¶ 41-44, PageID # 371-372 [Ex. H].

32) Defendant’s Voice Portal dialer utilizes *campaigns* – “file[s] which [are] loaded with a list of accounts to call.” *See* Livevox Manager User Guide, PageID #: 626 [Ex. I]. *See also* Supplemental Declaration of Randall A. Snyder, ¶¶ 42-43, PageID # 371-372 [Ex. H].

33) “Campaign files contain phone numbers and customer information for use on the Voice Portal dialing systems.” *See* LiveVox Manager User Guide, PageID #: 627 [Ex. I]. *See also* Supplemental Declaration of Randall A. Snyder, ¶¶ 42 and 45, PageID #: 371-372 [Ex. H].

34) Campaigns are uploaded to the Voice Portal dialer and stored for later automatic dialing. *See* LiveVox Manager User Guide, PageID #: 627-642 [Ex. I]. *See also* Supplemental Declaration of Randall A. Snyder, ¶¶ 42-45, PageID #: 371-372 [Ex. H].

35) When the Voice Portal dialer utilizes the Quick Connect (“QC”) automated outbound service, the Voice Portal dialer immediately connects live answers with an available

agent. *See* LiveVox Manager User Guide, PageID #: 534 [Ex. I]. *See also* Supplemental Declaration of Randall A. Snyder, ¶ 41, PageID #: 371 [Ex. H].

36) The Voice Portal dialer automatically initiates (dials) telephone numbers included in the campaign, according to the various strategies that may have been implemented by the “dialer team”. *See* Osborne Dep., p. 23:25, pp. 24-25 [Ex. F]. *See also* Supplemental Declaration of Randall A. Snyder, ¶ 45, PageID #: 372 [Ex. H].

37) As used by Defendant, “[t]he LiveVox system would make the phone calls, and if the connection is made, it would pass that particular call to an available representative.” *See* Osborne Dep., p. 23:21-23 [Ex. F].

38) When the Voice Portal dials a number and the connection is not sent to a collection representative, all actions related to the call are performed by the Voice Portal dialer exclusively. *See* Osborne Dep., p. 31:4-9, [Ex. F]. *See also* Supplemental Declaration of Randall A. Snyder, ¶¶ 17 and 25, PageID #: 364 and 367 [Ex. H].

VI. Defendant used the Voice Portal dialer to deliver 122 artificial and/or prerecorded messages to Plaintiffs cell phone after March 13, 2019.

39) When uploading a campaign to the Voice Portal dialer, a user has an Answering Machine (“AM”) option, which allows for the automatic leaving of messages. *See* LiveVox Manager User Guide, PageID #: 632-633 [Ex. I]. *See also* Supplemental Declaration of Randall A. Snyder, ¶¶ 17 and 25, PageID #: 364 and 367 [Ex. H].

40) Defendant “get[s] a file every morning of all [] accounts that are available for calling that day, and the team would create different strategies, throughout the day, on which accounts we’re going to call, which phone numbers we’re going to call, whether we are leaving messages, not leaving messages.” *See* Osborne Dep., p. 25:2-6, [Ex. F]

41) In the event that the Voice Portal dialer reaches an answering machine, the dialer can be configured to automatically 1) leave a message, 2) pass the connection to an agent, or 3) leave no message and disconnect. *See* LiveVox Manager User Guide, PageID #: 632-633 [Ex. I]. *See also* Supplemental Declaration of Randall A. Snyder, ¶¶ 17 and 25, PageID #: 364 and 367 [Ex. H].

42) When configured to leave automatic voice messages, the Voice Portal dialer uses selected *voice talents* -- artificial voices comprising various languages and accents. *See* LiveVox Manager User Guide, PageID #: 632 [Ex. I]. *See also* Supplemental Declaration of Randall A. Snyder, ¶¶ 17 and 25, PageID #: 364 and 367 [Ex. H].

43) After March 13, 2019, Defendant made one hundred and twenty-two (122) phone calls to Plaintiff using an artificial and/or prerecorded voice after Plaintiff requested calls stop to his cellular telephone number. *See* FNBO Account Activity Log, PageID #: 1042-1068 [Ex. L]. *See also* FNBO Outgoing Call log, PageID #: 1070-1139 [Ex. M].

RESPECTFULLY SUBMITTED,

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